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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Petitioners,

v.

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 14, 1970. Petition for rehearing was denied July 14, 1970.

Opinions Below

The opinions and orders of the courts below are as follows:

1. Memorandum opinion of the district court filed July 3, 1969, unreported (1a-25a).
2. Order of the district court filed July 18, 1969 (26a-27a).
3. Order of the Court of Appeals filed April 8, 1970 (28a-29a).

4. Opinion of the Court of Appeals filed May 14, 1970, not yet reported (30a-31a).

5. Judgment of the Court of Appeals filed May 14, 1970 (32a).

6. Order of the Court of Appeals denying motion for rehearing *en banc* filed July 14, 1970 (33a-35a).

7. Dissenting Opinion of Judge Sobeloff joined by Judge Winter (36a-42a).

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1970 (32a) and the petition for rehearing was denied on July 14, 1970 (33a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Petitioners, residents of the black ghetto of Charleston, West Virginia, are soon to be displaced by the construction of a federally aided interstate highway. They will be required to obtain new housing in a discriminatory market from which they are excluded because of race. This case presents the fundamental constitutional question of whether the Fourteenth Amendment requires that when persons are removed from housing by state and federal action and thereby subjected to private housing discrimination, government officials must first provide relocation housing available to them without regard to race. Additionally, petitioners are among the class of persons protected by the amendments to the Federal-Aid Highway Act of 1968, 23 U.S.C. §501 *et seq.*, which requires adequate assurances of relocation housing prior to their displacement by highway construction, and by the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.*, which requires federal agencies

to administer all activities relating to housing so as to further the national policy of fair housing. Relying on a no longer effective regulation, the United States Department of Transportation and the State Road Commission refused to provide such assurances, and the district court denied relief. The Court of Appeals affirmed, notwithstanding an intervening change in the regulations sustaining petitioners' position. Cf. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969). Under these circumstances, and especially where a precise statutory remedy is available to cure a constitutional wrong, are petitioners entitled to the relief which Congress has provided and which the Court of Appeals apparently acknowledged is their due?

Statutes and Regulations Involved

This case involves the Federal-Aid Highway Act of 1968, 23 U.S.C. §501 *et seq.*, particularly §§501, 502, 504(b), 508, 510 and 511 (3) (43a-46a), and the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.*, particularly §3608 (47a).

This case also involves the following regulations and policy directives issued by the Department of Transportation:

(1) Instructional Memorandum 80-1-68, ¶¶1, 2a. and b., 3, 4b., 5, 7, and 13, September 5, 1968, as amended by Instructional Memorandum 80-1-68(2), November 15, 1968 (48a-57a).

(2) Circular Memorandum, February 12, 1969 (58a-59a).

(3) Memorandum on Implementation of Replacement Housing Policy issued by Secretary of Transportation John A. Volpe, January 15, 1970 (60a-61a).

(4) Circular Memorandum, March 27, 1970, as amended, April 10, 1970 (62a-63a).

Statement

1. Summary of Proceedings in the Courts Below

Petitioners,[1] threatened with displacement by I-77, an interstate highway routed through Charleston, West Virginia's black ghetto, the Triangle, brought this class action on December 3, 1968 in the United States District Court for the Southern District of West Virginia. It challenges the failure of federal and state officials to assure, in accordance with the Fourteenth Amendment and the relocation housing requirements of the Federal-Aid Highway Act of 1968, the availability of relocation housing on a non-discriminatory basis for people evicted from their homes by highway construction.[2]

The evidentiary hearing on petitioners' motion for a preliminary injunction, April 2-3, 1969, focused on the refusal by federal highway officials to require the West

[1] The named petitioners are Keith Kincaid, Tennis Hogans, Robert Bayes, Katie Dean, Sedalia Haynes, and Lillian Day. The last named petitioner, Lillian Day, is white and represents the interests of low income white displacees. Individual petitioners are joined by the Triangle Improvement Council, an organization representing the Triangle community, and its officers.

[2] The complaint also challenged the adequacy of public hearings on the highway route and the failure of federal and state highway officials to consider the adverse social effects of the highway as required by 23 U.S.C. §128. Prior to the hearing on the motion for a preliminary injunction, the district court limited petitioners' proof to the problem of relocation housing (3a, 5a-6a, 10a-11a). This limitation on petitioners' proof, in effect a partial summary judgment made without any proceedings to determine whether triable issues of fact existed, was not appealed. The constitutional challenge related to the relocation housing problem—the denial of equal protection to blacks by their displacement into a racially discriminatory housing market without adequate governmental measures to assure the availability of alternative housing—was rejected by the district court (22a-25a), and although fully presented to the Court of Appeals, not discussed in its opinions.

Virginia State Road Commission to prepare and submit to the United States Department of Transportation for its review a relocation plan, as described in the Department's own regulations, which factually analyzes the problems of relocating displacees and proposes feasible methods to solve such problems. Federal and state officials defended their actions by contending that no relocation plan is required for the Triangle because federal *approval* of property acquisition in the Triangle preceded the passage of the Federal-Aid Highway Act of 1968, even though *actual* property acquisition and displacement in the Triangle prior to the Act's passage was negligible and actual construction of the highway had not yet been authorized. At the conclusion of the hearing on the motion for a preliminary injunction the case was submitted on the merits.

The district court ruled that the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, authorizes judicial review of actions of the Department of Transportation and that road displacees have standing to challenge the Department's failure to comply with federal relocation laws (12a-15a). On the merits, however, it dismissed, relying on one provision of the Department's regulations which purports to excuse federal authorities from following the otherwise applicable procedures for assuring the availability of relocation housing in situations where the *approval* of right of way acquisition preceded the 1968 Act. (Instructional Memorandum 80-1-68 (5)(b), (52a)). The court observed that both federal and state highway officials "interpreted the statutory and regulatory language to mean that the relocation requirements of the 1968 Act were not applicable to the particular projects here in question since final authority for right-of-way-acquisition was given long before the 1968 Act was passed" (19a). Without discussing in any detail petitioners' arguments that this administrative regulation undermines the clear intent of Congress to protect

all persons displaced after the passage of the 1968 Act, the district court ruled "that the agency's determination had a rational basis and should not be disturbed" (21a). Finally, even in the absence of compliance with the procedures required by the 1968 Act and the Department's regulations to determine whether replacement housing actually existed, the district court independently concluded "that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor" (23a). The district court's judgment of July 18, 1969 dismissed the complaint from the court's docket (26a-27a).

Prior to the hearing on petitioners' appeal to the United States Court of Appeals for the Fourth Circuit, petitioners' interpretation of relocation requirements was validated by the Department of Transportation. It issued new relocation regulations—a policy directive from the Secretary of Transportation and an implementing memorandum from the Federal Highway Administration—which acknowledge the immediate applicability of the 1968 relocation amendments to all projects on which *construction* has not been authorized even if *authorization to acquire* property had been granted prior to the 1968 Act (60a-63a). Petitioners became aware of the new policy upon reading newspaper reports of a departmental press release and requested a copy of the Secretary's new policy directive. The federal defendants only produced the policy directive after being required to do so when the Court of Appeals on April 8, 1970 ordered that the new regulations be made part of the record on appeal (28a-29a).[3]

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[3] The reticence of the federal defendants in this regard included first denying to petitioners' counsel that the regulations even existed, and, after changing that position, filing a lengthy memorandum in the Court of Appeals, opposing petitioners' motion for their production. *Cf.* Opinion of Sobeloff, J., 41a, n. 6.

The Court of Appeals on May 14, 1970 filed a one sentence opinion affirming "on the opinion of the district court" (30a-31a). On July 14, 1970 petitioners' petition for rehearing en banc was denied without opinion (35a). Judge Sobeloff, joined by Judge Winter, dissented.

Although there was no majority opinion, the reasoning of the court and the majority was set forth in the dissent without contradiction. Judge Sobeloff's opinion reports that the entire court agrees that in light of the Department of Transportation's new regulations, (1) the "satisfactory assurances" of the state that relocation housing is available which the Federal-Aid Highway Act, 23 U.S.C. §502, requires before federal officials are permitted to approve highway projects "may not be merely vague or general promises" but must be a well documented and factual plan which either demonstrates the availability of alternative housing or proposes specific measures to obtain it (38a); and (2) that review and approval of a relocation plan is not limited to the early stage of property acquisition, but must be repeated prior to the approval of construction (39a). As Judge Sobeloff describes the court's unanimous conclusion:

> There is, of course, no dispute within the court that the appellants' [petitioners here] position on the applicability of the 1968 amendments has now become the law and that comprehensive relocation plans are required before construction can be approved (41a).

Furthermore, the opinion makes clear that the requirement of a comprehensive relocation plan is not met by the district court's substitution of its independent conclusions on the availability of housing, for the "precise, effective administrative procedure for evaluation of the adequacy of proposed replacement housing" established by Congress (37a, n.2).

Judge Sobeloff explains the majority's affirmance by its apparent conclusion "that the new regulation, expressly recognizing plaintiffs' rights under the 1968 amendments, has somehow eliminated the need for relief" (41a-42a). Believing "that there is no reason to suppose that the new policy will not be applied to the Triangle" the majority seemed to have concluded to itself that petitioners' "claim is thus mooted, at least for the time being" (42a). In contrast, Judge Sobeloff found in light of the position taken by federal highway officials even after the change in regulations that no relocation plan is required, that "the question is anything but moot . . . On the contrary, the defendants' refusal to accord the plaintiffs' their rights cries out for redress" (*Ibid*).

Just a few days before the denial of the petition for rehearing the West Virginia State Road Commission resumed demolition of houses in the Triangle. A community protest resulted in arrests and an order on July 10, 1970 from Secretary John A. Volpe to the State Road Commission to halt demolition in Charleston. The same day the State Road Commission notified the Department of Transportation that it would disregard the order and continued with demolitions.[4] No federal action was taken to enforce the order, and petitioners moved in the Court of Appeals for an injunction enjoining evictions and demolitions pending the disposition of this petition for certiorari to protect the substantial number of persons not yet displaced. On August 20, 1970, Judge J. Braxton Craven, Jr., a member of the original panel which heard the appeal, denied the requested stay on the ground that such a "substantive" stay pending this Court's decision on the instant petition should be con-

[4] The federal directive and the state response are appended to the Response of Federal Appellees to Motion for Stay Pending Review on Certiorari, as filed in the Court of Appeals.

sidered only by a member of this Court. An application to the Circuit Justice for such a stay is being presented simultaneously with the filing of this petition.

2. Summary of Facts

I-77 is being constructed as part of the interstate highway system and the federal government is assuming 90% of the highway's costs. Under the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. §101 *et seq.*, there are two major stages at which federal approval of state plans is required, after route selection itself: (1) immediately prior to right-of-way acquisition, and (2) prior to actual construction (39a). Although federal authorization to acquire property in the Triangle had been given to the West Virginia State Road Commission in 1966 and 1967, the stage involving approval of actual construction plans has not been reached.

Between the time of approval of right-of-way plans and now, the West Virginia State Road Commission has engaged in some acquisition, displacement and clearance in the Triangle. Little actual acquisition preceded the passage of the highway relocation amendments in August 1968, no more than 9 of 65 parcels to be acquired having been acquired by that time (Plf. Exh. No. 4). As of the district court hearing in April, 1969, only 17 of the 300 persons who will be displaced from their homes had been displaced, and only 9 additional parcels had been optioned to the state and one condemnation action begun (Def. Ritchie Exh. No. 1; Plf. Exh. No. 4). Even at the time the appeal was argued before the Court of Appeals in May, 1970, petitioners counted 262 persons remaining in the right-of-way. Following the Court of Appeals' affirmance displacement accelerated and by the time the court denied the petition for rehearing in July, 1970, 189 persons (150 by federal defen-

dants count) remained to be displaced. Presently, at least half the displacements of people, 60% of the demolition of buildings, and federal approval of construction remains before construction may actually begin.

The problem presented to the Triangle by these displacement plans is of grave national importance and exceedingly important in Charleston. The Triangle is the largest black community in West Virginia and its residents are hindered by racial discrimination and poverty in their search for alternative housing in a city where the shortage of available low income housing has been well documented by federal studies (36a, Plf. Exh. Nos. 14, 16). The shortage has worsened, as Judge Sobeloff notes, as a variety of governmental programs cause extensive demolition throughout the city (36a). In the Triangle the situation is especially critical. The combination of previous acquisition by a public water company, extensive clearance in a recently approved urban renewal project, and the highway will, when all projects are completed, displace *all* of the Triangle's 2000 residents (Def. Ritchie Exh. No. 1).

These critical problems have been well known to federal highway officials. Shortly prior to the adoption of the 1968 Act the federal officer in charge of relocation programs in West Virginia analyzed Charleston's relocation housing problems and found "that the private housing market is about saturated presently", "that the relocation problem in the Charleston area, insofar as the State Road Commission is concerned, could become critical in the not too distant future", and that "the available replacement housing in this area is being depleted and no new sources are available at this time" (Plf. Exh. No. 12). Yet, no remedial action was ever required.

Heedless of these problems, the Department of Transportation decided not to require any systematic planning

for relocation housing after the passage of the 1968 Act. Instead, federal highway officials relied mainly[5] on the availability of short term rent supplements to temporarily subsidize displacees in expensive housing that they could not normally afford. The federal division engineer testified that without rent supplements "I'm not at all sure they could have gone through with the relocation program in the area" (Tr. 414). However, there are no plans to permanently rehouse displacees after the two-year supplements expire (Tr. 414-15).[6]

The district court based its finding that adequate relocation housing exists on its conclusion that public housing could be used to rehouse all displacees even though all that the West Virginia State Road Commission was willing to assert is that a "majority" of Triangle displacees "appear" to be eligible for public housing (Def. Ritchie Exh. 1). Beyond this "finding" the district court relied on oral assurances to the court during the hearing that relocation activities will be lawfully conducted, assurances which the court "assumed" were given "in good faith" (22a).

The Department of Transportation's own regulations, which implement the statutory obligation of assuring the availability of relocation housing provide a basis for determining the nature of relocation problems and proposing methods for solving such problems. The relocation plan must first describe the methods and procedures used by state highway departments to assess the needs of displacees

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[5] When asked whether the housing problems described above had changed, the only change cited by the division engineer, the chief federal highway officer in West Virginia, was the availability of rent supplements (Tr. 412-15).

[6] In some instances, these rent supplements have been denied by the State Road Department, on the ground that the replacement housing, although more expensive, did not meet the Department of Transportation's standards of "decent, safe and sanitary" housing.

and the availability of housing (IM80-1-68 (7) (b) (1) and (2) (53a-54a)). Then state highway departments are required to conduct surveys using approved methods and on the basis of these surveys formulate a relocation plan. The plan should describe problems revealed by the survey, analyze federal and other governmental programs affecting the availability of housing, propose solutions to problems and demonstrate that the plan is adequate "to carry out a timely, orderly and humane relocation program" (IM-80-1-68 (7) (b) (3) (54a-55a)). Yet, in spite of the availability of this precise method of implementing the statutory scheme no relocation plan has been required by federal highway officials.

When on two different occasions the West Virginia State Road Commission did submit fragments of deficient relocation plans to federal highway officials, no action was taken to require their improvement. The first time, shortly prior to the passage of the 1968 Act, federal officials requested information on relocation problems and the state provided what the federal relocation officer in West Virginia could only characterize as "one-half of a relocation plan" (Tr. 63). The federal officer further testified that no action was taken to secure the other half of the plan because "it was not considered in our opinion required that they have a complete one" (*Ibid.*). Then subsequently, when state officials prepared a "relocation plan" in response to the lawsuit (Tr. 359) the federal relocation office did not review it and upon being asked whether he had "seen" it answered only: "I have seen it. That's about all." (Tr. 116)

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Assure the Effectuation of an Act of Congress Designed to Provide Adequate Relocation Housing for Persons Displaced by Federally Aided Highway Construction and Prevent Discrimination Against Minority Group Displacees in Violation of Both the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act of 1968.

This case presents a fundamental constitutional question which was presented to the Court of Appeals and decided against petitioners without discussion: does the Fourteenth Amendment require government officials to assure the availability of relocation housing to racial minorities removed from housing by state and federal action and victimized by a racially discriminatory housing market? There is a conflict on this question between the Fourth Circuit, which in this case by its silence decided it adversely to petitioners, and the United States Court of Appeals for the Fifth Circuit, which in *Arrington* v. *City of Fairfield*, 414 F.2d 687 (5th Cir. 1969) decided that question in the affirmative. In *Arrington*, the displacement of black persons by a publicly assisted renewal project resulted in their being placed in a highly discriminatory housing market. Reversing the district court's granting of summary judgment for the city, the Fifth Circuit held that such state action was a denial of equal protection. Id. at 692-93. See also *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), holding that a municipal urban renewal which displaced black residents had a discriminatory impact because of discrimination in the private housing market.

The constitutional question fundamental to this case, however, can be avoided by giving effect to the statutes which petitioners submit control this case. The Federal-Aid Highway Act of 1968 provides for the relocation planning which petitioners submit should have been furnished in this case. Moreover, that Act and the regulations promulgated under it must be read in the light of the Fair Housing Act of 1968 which requires that all federal agencies act so as to insure that their activities affecting housing are carried out in a manner which will promote the national goal of fair housing.

The 1968 amendments to the Federal-Aid Highway Act are of great national importance. For years the problems of persons left homeless by interstate highway construction had caused nationwide concern. Prior to the passage of this Act, the highway builders had no obligation to give any assistance to those displaced by the roads. As Judge Sobeloff observed: "The cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal" (36a). A series of studies by Congressional committees, federal departments, and independent agencies all confirmed that the burden of these displacements, fell most heavily on minority groups and the poor. E.g., Select Committee on Real Property Acquisition, *Study of Compensation and Assistance For Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, 88th Cong., 2nd Sess. (1964); Advisory Commission on Intergovernmental Relations: *Relocation: Unequal Treatment of People and Business Displaced by Government* (1965); United States Department of Transportation, *Highway Relocation Assistance Study*, 90th Cong., 1st Sess. (1967). With the acceleration of highway construction in urban areas Congress also noted, as observed by the sponsor of the 1968

Act, Senator Jennings Randolph, that "these dislocations and displacements caused by urban highways have been the cause of much of the discontent and unrest in our cities" (114 *Cong. Rec.* 8037). In response Congress declared in the Federal Aid Highway Act of 1968 that "the prompt and equitable relocation of persons . . . displaced as a result of . . . the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 23 U.S.C. §501.

The Court of Appeals apparently acknowledged that this important remedial legislation fully protects all persons not displaced as of the time of the Act's passage even if technical authorization to acquire property had been granted prior to 1968, and that the statute and regulations require the preparation and review of a comprehensive relocation plan (41a).

The relocation amendments were adopted twelve years after the interstate program began in 1956. Of the 41,000 miles in the interstate system, 26,000 had been constructed and 6000 more miles were under construction at time the relocation amendments were adopted. For the tens of thousands of persons already displaced by these highways the 1968 Act had no meaning. But the Act was designed to protect people living within the right-of-way of the remaining 9000 miles, of which 8500 were already in engineering design or right of way construction at the time the 1968 Act was adopted. 1968 U.S. Code Cong. Adm. News 4046. If the relocation provisions were to have any meaning, they had to be given full effect at once.[7]

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[7] At first the Department of Transportation narrowly construed the provision which requires the submission of "satisfactory assurances" from state highway departments that adequate relocation housing will exist prior to displacement before the Secretary of

The second issue on which the Court of Appeals, as reported by Judge Sobeloff, agrees with petitioners is that a relocation plan is required (41a). This conclusion is clearly correct, even though the Department's new policy directives and regulations do not speak specifically of a relocation plan. Instead they provide that the federal officials may not authorize any phase of construction, including demolition which will cause displacement, *or* permit the dislocation of persons from approved projects until adequately relocated (Circular Memorandum, April 10, 1970 (62a-63a)). The conclusion that a relocation plan is required derives from the fact that the relocation plan is the only mechanism by which problems can be analyzed with sufficient precision and also within sufficient time to allow remedial action. While a case by case appraisal of relocation problems at the time of displacement is undoubtedly

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Transportation may approve "any project", 24 U.S.C. §502 (43a-44a). It held this to apply only to an early phase of project approval including right-of-way acquisition. Petitioners contended that the intent of Congress requires application of the relocation amendments at any phase of project approval at which displacement was likely, especially the approval of actual construction. This contention was supported by 23 U.S.C. §504(b) (44a), which makes the act retroactively effective by requiring the amendment of previously executed project agreements and by 23 U.S.C. §511(3) (46a), which defines a "displaced person", the very individual protected by the Act, as "any person who *moves* from real property on or after the effective date of this chapter. . . ." (Emphasis added.)

While this case was pending in the Court of Appeals, the Department issued new regulations (60a-63a) which acknowledged the correctness of petitioners' position, and destroyed the rationale of the District Court's opinion which had been bottomed on deference to the agency's interpretation of the statute it was administering (19a-21a). Under the rule of *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969), the new regulations were apparently considered by the Court of Appeals to control the disposition of the appeal. (See 41a, esp. n. 3; 28a-29a).

salutary, it is no substitute for the kind of comprehensive planning prescribed by the Department's regulations.[8]

Yet, while recognizing the correctness of petitioners' legal position the Court of Appeals in its judgment affirmed the dismissal of the action. The affirmance was based solely "on the opinion of the district court" (31a), which Judge Sobeloff notes cannot "logically" serve as a basis of the appellate court's decision following the change in agency regulations (41a). Instead the Court of Appeals apparently ruled that petitioners' claim has been mooted because the court believed that federal and state officials would fulfill the relocation plan requirement.

This unarticulated belief was formed despite the clear refusal of federal officials to require and the review a relocation plan. In Judge Sobeloff's words:

> The question is anything but moot. The defendants have consistently taken the position, both before and during the litigation, that the state authorities need not submit and the federal officials need not review a formal relocation plan. They have continued to press this contention on appeal in spite of the policy change of which they were aware.

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[8] The Department of Transportation itself recognized the critically central role of relocation planning when it recommended to Congress, prior to the passage of the 1968 Act, that the need to require relocation plans in urban areas be met in legislation. United States Department of Transportation, *Highway Relocation Assistance Study*, 90th Cong. 1st Sess. 16-17 (1967). The Department regulations issued immediately after the passage of the 1968 Act implemented the relocation plan requirement. Subsequent directives provided for the formulation of relocation plans even after some displacement has taken place (Circular Memorandum February 12, 1969). Any interpretation of the Department's regulations which leaves any group of displacees without the essential protection provided by a relocation plan would be patently arbitrary and understandably rejected by the Court of Appeals.

> Moreover, they have been less than forthright in the course of this litigation. They resisted, without justification, producing the very memorandum of the Secretary that announced the new position and did not supply it until ordered to do so by the court. Under these circumstances I cannot think that court-ordered relief would be superfluous. On the contrary, the defendants' refusal to accord these plaintiffs' their rights cries out for redress (42a).

In fact, shortly after the denial of the petition for rehearing en banc federal officials reiterated to the Court of Appeals in their opposition to a motion for a stay pending certiorari that they would not require state officials to prepare a relocation plan.

Furthermore, as the dissent asserts, even if injunctive relief should be delayed to give federal officials an opportunity to comply with the law it was still incumbent on the Court of Appeals to declare the law as it was at the time the appeal was decided. Again, in Judge Sobeloff's words:

> Nor do I perceive any justification for the cavalier treatment accorded the appeal and the petition for rehearing. Even if injunctive relief is not appropriate this Court should not, by its silence, permit any possible implication that the obligations on the defendants have not been altered since the District Court's order. As I understand it, the affirmance is based on confidence that the defendants will perform their duty, not that they have none to fulfill. When the court acknowledges the duty but without explanation does nothing to enforce it, the decision will be read by some as a holding that there is no duty. At the very least the court should have explicated its rationale to under-

score the obligation and prevent misreading. Its failure to do so constitutes serious error (42a).

Moreover, the non-legal arguments raised by federal and state highway officials have little merit. They have asserted throughout this proceeding that compliance with the 1968 amendments would cause serious delay in the completion of I-77. Yet if, as they assert, adequate relocation housing exists, the preparation of a relocation plan by the state authorities and its review by the Department of Transportation should be a simple and rapid procedure, particularly in view of the fact that most of the data which would be required in the preparation of such a plan are already available from the Department of Housing and Urban Development, which prepared a similar plan in connection with a proposed urban renewal project. Indeed, such a plan could have been completed in a fraction of the time the present litigation has been pending. The necessary conclusions are that the preparation of such a plan would demonstrate the absence of acceptable relocation housing and the necessity for its being provided, and that petitioners are indeed justified in demanding compliance with the 1968 amendments.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

APPENDIX A

Opinions and Orders Below

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

CA 68-183 CH

TRIANGLE IMPROVEMENT COUNCIL, a non-profit organization created and organized under the laws of the State of West Virginia, as an individual, by and in behalf of its officers and members, WILLIAM S. PRESTON, CLARENCE SMITH, REGINA McLENDON, JUDY ECKLES, HENRY C. HAYNES, and LESLIE BRADSHAW; and KEITH KINCAID, TENNIS HOGANS, ROBERT BAYES, KATIE DEAN, SEDALIA HAYNES and LILLIAN DAY, as individuals,

Individually and on behalf of all others similarly situated,

Plaintiffs,

VS.

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia; O. R. COLAN, Director of Right of Way Division, State Road Commission of the State of West Virgnia; ELMER H. DODSON, Mayor of the City of Charleston, West Virginia, THE CITY OF CHARLESTON, West Virginia, a city corporate and body politic; the CITY COUNCIL OF THE CITY OF CHARLESTON, the corporate board of that city; JOHN VOLPE, individually and as Secretary of Transportation of the United States; LOWELL K. BRIDWELL, individually and as Administrator of the Federal Highway Administration of the United States and FRANCES C. TURNER, individually and as Director of the Bureau of Public Roads of the United States,

Defendants.

Opinion of District Court

MEMORANDUM OPINION

This dispute involves the location of a small segment of the Federal Interstate and National Defense Highway System as it is presently planned in a section of Charleston, West Virginia. The highway segment in question penetrates what is known as the Triangle area of Charleston which is populated predominantly by low-income families of the negro race. The disputed routing was approved in August 1964, and plaintiffs herein seek declaratory and injunctive relief against further steps for construction of the highway as presently routed.

Plaintiffs are a group of residents and citizens of the Triangle area and a local civic improvement association known as the Triangle Improvement Council (hereinafter TIC). The defendants include highway officials of the United States Department of Transportation (Federal defendants) and the State Road Commission of West Virginia (State defendants), and additionally, the City of Charleston, West Virginia, and its City Council and Mayor (Municipal defendants). The court recognizes that since this action was commenced certain personnel changes in the high levels of federal and state governments have resulted in different individuals being appointed to positions occupied by certain of the original defendants. Specifically, William S. Ritchie is now the Commissioner of the State Road Commission of West Virginia and John Volpe is now the Secretary of Transportation of the United States. Although Mr. Ritchie and Mr. Volpe have not been formally substituted as named defendants, the court recognizes such a substitution to be proper and accordingly makes such a substitution, pursuant to R. 25(d)(1), F.R.C.P.

The prime bases of the action are the alleged failure of the state and federal defendants to comply with the

relocation provisions of the Federal Highway Act of 1968, Pub. L. No. 40-495 (August 23, 1968), 23 U.S.C. Sections 501-511, and the alleged violation by the defendant of plaintiffs' constitutional rights under the Fourteenth Amendment. In addition, plaintiffs alleged a failure by the defendants to comply with the public hearing requirements of the federal statutes relative to the route selection for the interstate highway system in Charleston.

After an earlier denial of a motion by plaintiffs for a temporary restraining order, an evidentiary hearing was held on April 2 and 3, 1969, on a motion by plaintiffs for a preliminary injunction and motions to dismiss filed by the various defendants. The court being of the opinion that the allegations relative to the public hearing requirements were, based upon affidavits and exhibits submitted at the hearing on the temporary restraining order, plainly without merit, restricted the evidence in the proceedings on April 2 and 3 to the allegations relative to relocation; i.e., (1) failure to comply with the statutory provisions and (2) the constitutional equal protection question raised by plaintiffs relative to the relocation procedures.

Since this action was filed on December 3, 1968, a substantial number of motions, orders, etc. have been considered by the court and disposed of as follows.

Except for extensions of time within which to file answers, no formal action was taken in this proceeding until March 5, 1969. Prior to that time, however, certain collateral "side agreements" were made between counsel relative to the matter of interstate highway progress in the Trlangle area. Disagreements eventually arose relative to the breadth and import of the "side agreements," and on March 5, 1969 plaintiffs moved the court for a temporary restraining order which would have effected a cessation of all interstate highway activity in the Triangle area.

Certain broad subpoenas duces tecum were also issued on that date, directed to federal and state highway officials.

On March 10, 1969, a hearing on the motion for the temporary restraining order was held. At that time, motions to quash the subpoenas duces tecum which had been issued were filed and argued. As a result of that hearing, the court was of the opinion that injunctive relief would irreparably hinder the interstate highway program and that the subpoenas duces tecum were overly broad and oppressive. Accordingly, a motion for a temporary restraining order was denied and the motions to quash the subpoenas duces tecum were granted.

On March 10, 1969, motions to dismiss the complaint were filed on behalf of the federal defendants, the state defendants, and the municipal defendants. These motions were supported by certain affidavits and exhibits. At that time, the motion to dismiss the municipal defendants was denied, and other dismissal motions were held in abeyance, and a hearing on the dismissal motions and on a motion for a preliminary injunction was set for April 1, 1969. An order reflecting the March 10 actions of the court was submitted by counsel and was entered on March 21.

On March 13, the plaintiffs caused more subpoenas to be issued for certain federal and state highway officials for the avowed purpose of taking the depositions of those officials. The state and federal defendants moved to quash the new subpoenas, alleging oppressiveness and lack of time to comply therewith prior to the April 1 hearing. A hearing on the motions to quash was held on March 17, and the court, being of the opinion that the motions were well taken, granted them and thereby quashed the subpoenas. An order reflecting this action was entered on March 24.

On March 24, plaintiffs moved the court to be permitted to amend their complaint in order to allege jurisdiction under the Administrative Procedure Act, 5 U.S.C. Sections 701 et. seq. The court was of the opinion that this motion was tardily made, and it was denied by order of March 28.

Also on March 24, the plaintiffs filed motions for production of certain documents alleged to be in the possession of federal and state officials. The defendants, on March 28, moved that the motions for production be quashed by the court. The court heard these motions on March 29, and being of the opinion that it would be overly burdensome to require their production on such short notice prior to the hearing on this matter, denied the motions for production and granted the motions to quash. However, the court instructed the defendants to bring all relevant material to the scheduled hearing, in order that plaintiffs and the court might have the benefit of it. In addition, the hearing date was set over until April 2 in order to accommodate counsel for the state defendants. An order reflecting these actions was entered on April 28.

Prior to March 29, the court had met informally with counsel for the various parties, at which time counsel were advised that the court considered any challenge to the highway routing decision to be barred by laches, and that the court was of the opinion that the only allegation of possible merit made by plaintiff related to the displacee relocation assistance program being administered by the State of West Virginia. Counsel were accordingly requested to prepare for the hearing with that in mind, and so present only evidence which related to the relocation assistance program.

On March 29, plaintiffs filed a formal written motion with the court to the effect that they be permitted to present

evidence at the scheduled hearing on all the issues and theories of law embodied in their complaint. Such motion was denied, in accord with the court's previous decision to restrict evidence at the hearing to that which was material and relevant to the relocation issue. The denial of that motion was reflected in an order entered subsequent to the hearing, on April 28.

On April 2 and 3, the evidentiary hearing was held relative to the various dismissal motions and to the motion for a preliminary injunction which had been formally filed by plaintiffs on April 1. At the conclusion of the presentation of evidence, the court denied the various dismissal motions and the motion for a preliminary injunction. Counsel thereupon agreed to submit the case to the court on the record as then developed for decision on its merits. It was further agreed that briefs on the merits of the case would be submitted by April 23, which date was subsequently changed, on plaintiffs motion, to May 5. In addition, the court reconsidered its ruling relative to the denial of plaintiffs motion to amend its jurisdictional allegations. The order denying them the right to allege the Administrative Procedure Act, 5 U.S.C. Sections 701 et. seq. as a basis for jurisdiction in this proceeding was vacated and the motion to amend was granted. An order reflecting the court's actions on all of these matters was entered on April 29.

By May 8 all defendants had filed answers in this matter, counsel had filed briefs with the court on the merits of the case, and the case was submitted for final disposition.

Background Discussion

In 1956, the Congress of the United States provided for the construction of the extensive Interstate Highway

System. The statutory bases for the program were the Federal-Aid Highway Act of 1956 and the Highway Revenue Act of 1956. Numerous amendments have since been made to the original statutes, and, in 1968, the relocation assistance provisions were greatly expanded. Prior to 1968, however, much had transpired relative to the routing of the interstate system in the Kanawha Valley and Charleston, West Virginia, area.

Charleston was planned as the hub of the interstate system in West Virginia, and three interstate routes will converge on the Charleston area. Interstate Route 77, running north-south from Cleveland, Ohio to the southeastern United States, and Interstate Route 64, running east-west from coast to coast, both come through the Charleston area. The third Interstate Route, I-79, enters the Charleston area from the north, beginning at Erie, Pennsylvania, and terminating at Charleston.

Extensive planning, research, public discussion, and controversy was necessarily attendant upon the routing of these highways in the Charleston area. The record indicates that public hearings relative to these routes were held in Charleston on March 29, 1960 and June 10, 1964, and transcripts of these hearings have been submitted to the court. Prior to the 1964 hearing, numerous studies were made relative to the routing, the most important of which, the so-called TAMS study, was completed in early 1964. The proposed system recommended by the TAMS study was discussed at the 1964 hearing, and, along with nine alternate routes, was portrayed by maps, aerial photographs, and numerous exhibits. At the time of the 1964 hearing, the State Road Commission of West Virginia had indicated no preference among the suggested routes and it emphasized that none would be chosen until a study of

developments at the hearing was made along with other relevant data.

Consideration of the interstate system routing in Kanawha County and Charleston was concluded in August of 1964, with final approval of the Bureau of Public Roads being given on August 31, 1964. As approved, the routing of I-77 and I-64 (primary designation of the highway is I-77, secondary designation is I-64, and is hereinafter referred to as I-77) penetrates the Triangle area of Charleston. No protest from the plaintiffs in this action relative to that routing was made until December 3, 1968, when this action was filed.

Construction of the interstate highway system through the Triangle area involves two interstate projects of the State Road Commission. These two projects are designated I-77-3(66)100 (hereinafter Project A) and I-77-3(67)98 (hereinafter Project B). The evidence indicates that each of these projects involves part of the Triangle area, and while all of the Triangle area affected by the interstate system is located within the confines of these two projects, the entire area encompassed by these projects includes areas outside the Triangle.

The evidence indicates that the Bureau of Public Roads, in addition to approving the routing of the highway, is required to make certain step-by-step authorizations of funds to be utilized in the projects such as surveying, abstracting titles, acquiring rights-of-way, and various other aspects of the highway construction. In this regard, the two subject projects were in the right-of-way acquisition and displacee relocation stage when this action was commenced. The actual dates on which authorization for right-of-way acquisition was given were, according to the testimony at the hearing, as follows:

1. PROJECT A—(four separate authorizations)
   (a) April 19, 1966
   (b) September 22, 1966
   (c) January 27, 1967
   (d) May 23, 1967

2. PROJECT B—November 30, 1966

It is apparent, therefore, that complete authority for right-of-way acquisition in the Triangle area had been given by May 23, 1967, and had been in effect over a year prior to the enactment of the 1968 Highway Act.

At the time of the approval of the routing in question by the Bureau of Public Roads, the applicable statutory provisions relative to displacee relocation assistance was 23 U.S.C. Section 133. Compliance with that statute, enacted in 1962 in Pub. L. No. 87-866, was required before a state could participate in the federal financial assistance available for highway construction. Plaintiffs do not allege that the state defendants were not complying with Section 133, but contend that the provisions of 23 U.S.C. Sections 501-511 (Pub. L. No. 90-485), which repeals Section 133 now apply and are not presently being met by the state defendants. As noted, the new relocation assistance provisions (Sections 501-511) were enacted August 23, 1968, over a year after the last authorization for right-of-way acquisition was given the West Virginia State Road Commission by the Bureau of Public Roads.

The record in this case fails to indicate any complaints from the plaintiffs herein prior to the institution of this action relative to the highway location in the Triangle area.

The record does, however, indicate that State Road Commission officials met with TIC members and Triangle area residents in 1965 and discussed the impact that the interstate would have on that area. None of the questions raised in this action were raised at that conference.

The Routing Decision

As noted above, the routing of I-77 through the Triangle area was approved by the federal authorities August 31, 1964. Prior to that time, on August 20, 1964, the State Road Commission of West Virginia had finalized its determination of the manner in which the interstate system in Kanawha County and Charleston should be routed. The record in this action indicates that the State's routing determination complied with the federal statutory and regulatory requirements in effect at that time. They had made a comprehensive study of the matter, had held open and well-advertised public hearings, and had, as administrative officials must do, made the decision on the interstate routing. The federal government which pays for 90 percent of the cost of interstate highway construction approved the state action. The endorsement by the federal authorities of the state's routing decision is strong evidence that the proper procedure for highway planning and routing had been followed.

Furthermore, it is undisputed that the plaintiffs herein sat on their alleged rights for over four years until the interstate program was well into the right-of-way acquisition stage before seeking any judicial review of the administrative determination. I am accordingly of the view that the doctrine of laches precludes review of that decision at this late date, and that the only question of possible

merit raised in this instance relates to the displacee relocation procedure relative to those persons living in the I-77 corridor in the Triangle area.

Of further relevance on the question of undue delay by plaintiffs in bringing their action is the testimony by federal and state officials relative to the effect injunctive relief might have upon the entire interstate highway program in Charleston. The evidence indicates that such relief might delay completion of the system by as much as five years, would cause comprehensive new planning procedures to be initiated, would result in an additional financial burden of staggering proportions, and could result in a complete cessation of the flow of federal interstate highway-aid funds into this area of West Virginia.

The Relocation Questions

As noted above, the displacee relocation assistance provisions relied upon by the plaintiffs herein were enacted into law on August 23, 1968. Pursuant to its provisions, the Bureau of Public Roads issued Instructional Memorandum (IM) 80-1-68 on September 5, 1968, with an effective date of August 23, 1968.

In the two highway projects which affect the Triangle area, a substantial number of persons required relocation housing. Evidence presented at the evidentiary hearing indicated the following number of persons in Projects A and B either had been or were to be relocated, as of February 28, 1969.

In Projects A and B—as of February 28, 1969

	Project A	*Project B*	*Total*
To be relocated	380	496	876
Had been relocated	913	401	1,314
			2,190

Of these totals, however, not all are or were within the confines of the Triangle area as such. The figures for the Triangle area itself were as follows:

In Triangle area—as of February 28, 1969

	Project A	*Project B*	*Total*
To be relocated	104	180	284
Had been relocated	Not presented	Not presented	Not presented

The number of persons who had not been relocated from Projects A and B in the Triangle area as of August 23, 1968 (the enactment date of the Federal-Aid Highway Act of 1968, and BPR IM 80-1-68) was not presented. Accordingly, the number of persons relocated since August 23, 1968 was not determined.

Prior to consideration of whether the relocation program of the State Road Commission complies with 23 U.S.C. Sections 501-511 and BPR IM 80-1-68 is the question of whether those relocation provisions are at all applicable in the present controversy. Plaintiffs contend that the relocation provisions apply but are not being complied with, and, in fact, cannot be complied with; while defendants contend the relocation provisions do not apply to displacee relocation in Projects A and B in the subject area, and, in any event, the State Road Commission's displacee relocation program would satisfy those provisions.

JUDICIAL REVIEW

The plaintiffs allege jurisdiction in this court on the basis of federal civil rights statutes, 28 U.S.C. Sections 1981—1983, 2000(d), federal questions raised, 28 U.S.C. Section 1331(a), suits against officers and employees of

the United States, 28 U.S.C. Section 1361, the Administrative Procedure Act (APA), 5 U.S.C. Sections 701—706, and declaratory judgment statute, 28 U.S.C. Sections 2201 and 2202.

Without making a detailed analysis of each of these jurisdictional allegations, I am satisfied that judicial review of agency action pursuant to the federal highway program may be had. *Road Review League* v. *Boyd,* 270 F. Supp. 650 (S.D. N.Y. 1967). There is nothing in the federal statutes which indicates that Congress intended to immunize the Bureau of Public Roads from judicial scrutiny of its acts. As was stated in the recent case of *Western Addition Community Organization* v. *Weaver,* 294 F.Supp. 433 (N.D. Calif. 1968), which involved relocation of urban renewal displacees (at 442):

> "* * * The test for judicial reviewability, however, is not, as contended by defendants, whether the statute provides for it, but whether the statute precludes it. Federal administrative action is subject to judicial review unless the statute, itself, precludes such review."

Western Addition cites *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967) as authority for a basic presumption that judicial review is available to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action. It points out that this rule has been reinforced by the Administrative Procedure Act. Judge Sweigert stated in *Western Addition* (at 442):

> "When no other remedy for judicial review is provided, persons suffering legal wrong because of administrative action or otherwise adversely affected or aggrieved by it within the meaning of a relevant stat-

ute, may proceed under the Administrative Procedure Act (5 U.S.C. Sections 701, 702, 704) except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law."

In this instance, as in *Western Addition*, there is no statute precluding judicial review. I am accordingly of the view that the administrative decisions involved in this matter are judicially reviewable under the Administrative Procedure Act, 5 U.S.C. Sections 701-706.

STANDING OF PLAINTIFFS

Prior to any consideration of the merits of this matter, brief review should also be given to the question of whether the parties bringing this action have standing to challenge the actions of the defendants. As it was put by the Supreme Court in its recent consideration of the standing problem, *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968):

"* * * In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. * * *".

Title 5 U.S.C. Section 702, the section of the Administrative Procedure Act relative to the "right of review," provides that:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Under this section, the Supreme Court has held that a person is "aggrieved" if he asserts a personal interest which the "relevant statute" was designed to protect. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968). The relevant statute involved here, which is the Federal Highway Act of 1968, particularly the relocation assistance provisions contained therein, clearly was intended to protect persons such as the plaintiffs in this matter.

Several recent cases have allowed litigants who were situated similarly to the plaintiffs herein standing to challenge government projects, particularly *Scenic Hudson Preservation Conference* v. *Federal Power Comm.*, 354 F.2d 608 (2d Cir. 1965), *Nashville I-40 Steering Comm.* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied 390 U.S. 921 (1968), *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), and *Western Addition Community Organization* v. *Weaver*, supra. In addition, the Supreme Court has given a broadened scope to the Administrative Procedure Act in *Hardin* v. *Kentucky Utilities Co.*, supra, and *Abbott Laboratories* v. *Gardner*, supra. These cases would appear to have rejected the view expressed in such cases as *Green-Street Association* v. *Daley*, 373 F.2d 1 (7th Cir. 1967), and *Johnson* v. *Redevelopment Agency of Oakland*, 317 F.2d 872 (9th Cir. 1963), which would deny relocation displacees the standing to challenge governmental action relative to them.

In the light of the authorities cited above, I am of the view that under the broadened scope of the Administrative Procedure Act, the plaintiffs in this matter would qualify as sufficiently "aggrieved" under a "relevant statute" to permit this court to proceed with consideration of the merits of their claims.

THE STATUTORY QUESTION

As was previously stated, the basic question in this whole matter turns largely upon the applicability of the displacee relocation provisions of the 1968 Highway Act to the particular segments of I-77 which penetrate the Triangle area of Charleston. Plaintiffs, of course, assert that the provisions apply, while the defendants assert that they do not apply. An examination of the statute itself, and the administrative interpretations of it (IM 80-1-68), is appropriate to determine which of the parties should prevail on this issue.

In 23 U.S.C. Section 502, relating to "Assurances of adequate relocation assistance program," it is provided that:

> "The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State highway department that—
>
> (1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506 and 507 of this title;
>
> (2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and
>
> (3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and in-

> dividuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment."

The two statutory sections cited in the first sentence of Section 502 provide for the submission of certain plans, specifications, and estimates for federal-aid highway projects to the Secretary of Transportation by the state highway department. Those necessary to be submitted are to be such "as the Secretary may require," and his approval of them is deemed to place a contractual obligation upon the federal government.

In the instant case, the testimony of the Secretary's representatives was clearly to the effect that the West Virginia State Road Commission had complied with all federal requirements relative to right-of-way acquisition in Projects A and B in the Triangle area. In fact, as noted above, authority for right-of-way acquisition in Projects A and B was given by the federal government in 1966 and 1967, with the final authorization being given on May 23, 1967.

In 23 U.S.C. Section 504(b), the 1968 Highway Act provided that:

> "Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property."

In the Instructional Memorandum (IM 80-1-68) which the Bureau of Public Roads issued pursuant to the relocation provisions of the 1968 Highway Act, the following provisions relative to applicability were set forth in paragraphs 2b(1), 2b(2) and 5b:

"2. * * *

b. The provisions of this memorandum are applicable to the following:

(1) All Federal-aid highway projects authorized after August 23, 1968, involving rights of way which are occupied by an individual, family, business, farm operator, or nonprofit organization.

(2) All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

* * *

"5. * * *

b. The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum."

With specific regard to the West Virginia State Road Commission's efforts in this area, the testimony of both federal and state employees indicates to me that an active and continuing displacee relocation assistance program has been and is being carried out. It appears that such a pro-

gram was in effect even prior to enactment of the 1968 Highway Act. In any event, the West Virginia Road Commission personnel in authority in the area of relocation assistance, and the personnel in the West Virginia office of the Bureau of Public Roads, interpreted the statutory and regulatory language to mean that the relocation requirements of the 1968 Act were not applicable to the particular projects here in question since final authority for right-of-way acquisition was given long before the 1968 Act was passed. In particular, they felt that the correct position relative to applicability of the 1968 Act was set forth in paragraph 5b of IM 80-1-68, to the effect that:

> "The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum."

The defendants submit that even if there is a question as to whether the assurances were or were not required in this instance, the agency's construction of the applicable statutes and regulations should be given considerable weight and not be overturned unless plainly incorrect. They cite several cases in support of this position, including *Udall* v. *Tallman,* 380 U.S. 1 (1965), wherein Mr. Chief Justice Warren stated (at 16):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need

not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. See also, e.g., *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. 'Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

> 'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414."

I am convinced that this is a valid summary of the law in this area. I am further convinced, after analyzing the statutory provisions, their legislative history, and the instructional memoranda issued pursuant thereto, that Congress could not have intended that projects authorized and approved several years prior to the enactment of the 1968 statute were to be subject to inflexible and strict

compliance therewith. The administrative agency did not give it such an interpretation, and I am of the opinion that the agency's determination had a rational basis and should not be disturbed.

In any event, testimony of federal and state highway officials, especially that of the State Road Commission Director of Right-of-Way acquisition, O. R. Colan, indicates to me that the authorities are making a sincere effort to integrate the provisions of the relocation assistance provisions of the 1968 Highway Act into its program. Responsible public officials at both the federal and state levels testified forcefully and credibly that the West Virginia State Road Commission's displacee relocation program relative to the two projects affecting the Triangle area is in compliance with the provisions of the 1968 Act in a practical if not a formal manner, even though such compliance is not legally required. They assured the court that displacement would be conducted at a slow pace in order that appropriate replacement housing could be found, and that no one will be displaced unless suitable (i.e., decent, safe, and sanitary) and lawful relocation housing is available, and further that relocation assistance payments required by the statute would be made in all cases.

As mentioned above, this testimony indicates the federal defendants have determined that the West Virginia authorities can meet, are meeting, and will continue to meet the requirements of the regulations and statutes in its relocation program. As the case law indicates, such a determination is entitled to great weight and should be confirmed if premised on rational grounds. As many cases, including *Western Addition Community Organization* v. *Weaver*, supra, and *Road Review League* v. *Boyd*, supra, indicate, courts should not undertake the administration of complex

and far reaching federal programs, but upon appropriate judicial review should determine only whether the agency administering the program is in substantial compliance with the applicable statutes and regulations.

I should also reiterate that the evidence shows that as of February 28, 1969, only 284 persons were residing in the I-77 corridor in Projects A and B in the Triangle area of Charleston, West Virginia. It can be logically assumed that that number has been somewhat reduced in the period that has elapsed since February. In considering injunctive relief this court should, of necessity, weigh its possible beneficial effect upon this group of Triangle residents against its potential disruptive effect upon the program of the state and federal authorities charged with the responsibility of building east-west and north-south interstate highway corridors through West Virginia and the nation. The federal and state officials have assured the court that the persons residing in the interstate corridor in the Triangle will be dealt with in a manner that comports with the federal statutes and regulations, and I must assume that the highway officials gave these assurances in good faith. The evidence certainly supports such an assumption on my part.

The Constitutional Question

Plaintiffs further allege that even assuming that the State Road Commission's relocation program is lawful in other respects, it is being unconstitutionally administered insofar as it affects negro citizens residing in the I-77 corridor in the Triangle area. They allege that the dislocation of negroes into a "racially closed" housing market existing in Charleston constitutes a denial of equal protection of

the laws prescribed by the Fourteenth Amendment to the Constitution of the United States.

Without discussing this allegation in depth, I refer again to the representations made by the state and federal defendants to the court. They have assured the court that the relocation program can be carried out in complete compliance with existing law and that no racial discrimination will be practiced in the conduct of the program. Furthermore, I am satisfied from the evidence that the subject displacees from the I-77 corridor in the Triangle area can obtain housing within the range of their economic means without racial discrimination which would be of such a nature as to raise federal constitutional problems. It is clear that their greatest problem relative to housing is the basic lack of the financial means to secure such in many areas of Charleston. Many others, of all races, are faced with a similar problem, but this is not the result of invidious racial discrimination.

The evidence indicates that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor. I am satisfied that this evidence is accurate. Even should no housing be available for dislocatees in the private housing market, the evidence clearly demonstrates that there is ample public housing in the Charleston area to accommodate the limited number of individuals remaining in the I-77 corridor in the Triangle area.

Furthermore, evidence presented at the hearing on this matter suggests that some individuals in the subject corridor have refused offers of satisfactory and lawful relocation housing, unhappily in an attempt to further and improve the posture of this lawsuit. In at least one instance such refusal was at the request of counsel for plaintiffs

or their associates. This casts some question on the sincerity of the challenge plaintiffs have made to the relocation effort, and indicates that their primary objective is to block the interstate route which was finalized some five years ago.

Finally, it should be noted that the plaintiffs have specifically disavowed that there was any basic or specific racially discriminatory purpose on the part of defendants in the routing of I-77 or in the relocation of the displacees in that routing. There has been no showing that the location of this highway affects citizens of the negro race more adversely than it affects others in similar economic circumstances. That sufficient housing is available in the Charleston area to permit lawful relocation of all displacees, without regard to race, is sufficient to distinguish this case from the basic decision relied upon by plaintiffs, *Norwalk CORE* v. *Norwalk Redevelopment Agency*, supra. In that case the court ruled that a cause of action was stated when the plaintiffs alleged that the authorities were not even attempting to assure relocation for non-whites to the same extent as they were for whites.[1] In the present case

[1] "We do not understand plaintiff's constitutional argument to be that defendants must end discrimination in the Norwalk open housing market through the relocation plan, or even that defendants must find integrated housing for those displaced by the Project. Those are arguments we need not consider until they are appropriately put to us.

"What plaintiffs' complaint alleges, in substance, is that in planning and implementing the Project, the local defendants did not assure, or even attempt to assure, relocation for Negro and Puerto Rican displacees in compliance with the Contract to the same extent as they did for whites; indeed, they intended through the combination of the Project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the City of Norwalk. The argument is that proof of these allegations would make out a case of violation of the equal protection clause. We agree." (395 F.2d at 930).

the evidence that all racial groups are being provided relocation assistance on the same basis and to the same extent precludes, in my view, any valid constitutional question on this facet of this controversy.

I conclude that plaintiffs' allegations relative to the relocation assistance program on both the statutory and constitutional grounds are without merit, and accordingly the defendants are entitled to judgment on the issues and the complaint should be dismissed. This opinion will be filed as my findings of fact and conclusions of law on the issues presented, and counsel may submit an appropriate order incorporating this opinion by reference therein.

/s/ JOHN A. FIELD, JR.

JOHN A. FIELD, JR.
United States District Judge

Dated: July 2, 1969

Order of District Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON
CA 68-183 CH

TRIANGLE IMPROVEMENT COUNCIL, a non-profit organization created and organized under the laws of the State of West Virginia, as an individual, by and in behalf of its officers and members, WILLIAM S. PRESTON, CLARENCE SMITH, REGINA McLENDON, JUDY ECKLES, HENRY C. HAYNES, and LESLIE BRADSHAW; and KEITH KINCAID, TENNIS HOGANS, ROBERT BAYES, KATIE DEAN, SEDALIA HAYNES and LILLIAN DAY, as individuals,

Individually and on behalf of all others similarly situated,

Plaintiffs,

VS.

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia; O. R. COLAN, Director of Right of Way Division, State Road Commission of the State of West Virgnia; ELMER H. DODSON, Mayor of the City of Charleston, West Virginia, THE CITY OF CHARLESTON, West Virginia, a city corporate and body politic; the CITY COUNCIL OF THE CITY OF CHARLESTON, the corporate board of that city; JOHN VOLPE, individually and as Secretary of Transportation of the United States; LOWELL K. BRIDWELL, individually and as Administrator of the Federal Highway Administration of the United States and FRANCES C. TURNER, individually and as Director of the Bureau of Public Roads of the United States,

Defendants.

Order of District Court

ORDER

This day came the parties by their attorneys and for the reasons set forth in this Court's Memorandum Opinion, dated July 2, 1969, which Memorandum is hereby incorporated and made a part herein, it is ORDERED by this Court that defendants are entitled to judgment on the issues and the complaint should be dismissed.

Accordingly, it is ORDERED that the complaint be dismissed and that this matter be removed from the docket of this Court.

To all of which plaintiffs do hereby object and except.

ENTER:

July 18, 1969

/s/ JOHN A. FIELD, JR.
United States District Judge

/s/ JOHN BOETTNER
Counsel for Plaintiffs

/s/ L. ALVIN HUNT
Counsel for Defendants,
William S. Ritchie, etc., and
O. R. Colan, etc.

/s/ W. WARREN UPTON
Counsel for Defendants
Volpe, Bridwell and Turner

/s/ B. DUFFY HORAN
Counsel for Defendant Dodson
and for Defendants City of
Charleston and The City Council
of the City of Charleston

Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of West Virginia.

ORDER

Appellants have moved to require the federal defendants (the Secretary of Transportation, the Federal Highway Administrator, and the Director of Public Roads) to produce a memorandum of the Secretary regarding new relocation policies. Upon consideration of appellants' motion, appellees' response, and appellants' reply, the court is of

the opinion that the document should be furnished to counsel and made a part of the record in this appeal. It is so ordered.

/s/ CLEMENT L. HAYNSWORTH
Chief Judge, Fourth Circuit

/s/ SIMON E. SOBELOFF
United States Circuit Judge

/s/ HERBERT S. BOREMAN
United States Circuit Judge

A True Copy, Teste:
Samuel W. Phillips, Clerk

By Beverly M. Newell
Deputy Clerk

FILED
APR 8 1970

SAMUEL W. PHILLIPS
CLERK

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of West Virginia.
John O. Field, District Judge.

(Argued May 6, 1970 Decided May 14, 1970.)

Before BRYAN and CRAVEN, Circuit Judges and JONES, District Judge.

Michael Davidson (Jack Greenberg, John Boettner, A. Andrew MacQueen, III, Thomas J. O'Sullivan, Peter M. Collins and Steve Young on brief) for Appellants, and Walter

Opinion of Court of Appeals

H. Fleischer, Attorney, Department of Justice, (William D. Ruckelshaus, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, Wade H. Ballard, United States Attorney, L. Alvin Hunt, Stanley E. Preiser and Preiser, Greene, Hunt & Wilson on brief) for Appellees.

Per Curiam

We affirm on the opinion of the district court, —— F.Supp. —— (S.D.W.Va. July 2, 1969).

Affirmed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

[Title omitted]

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SAMUEL W. PHILLIPS
Clerk

FILED
MAY 14, 1970
SAMUEL W. PHILLIPS
CLERK

A True Copy, Teste:

Samuel W. Phillips, Clerk
By WILMA UPSHUR
Deputy Clerk

[SEAL]

Order Denying Rehearing *in banc* With Dissenting Opinion

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of West Virginia. John O. Field, District Judge.

ORDER DENYING REHEARING IN BANC WITH DISSENTING OPINION BY SOBELOFF AND WINTER, CIRCUIT JUDGES.

JULY 14, 1970.

Before BRYAN and CRAVEN, Circuit Judges and JONES, District Judge.

Michael Davidson (Jack Greenberg, John Boettner, A. Andrew MacQueen, III, Thomas J. O'Sullivan, Peter M. Collins and Steve Young on brief) for Appellants, and

Order Denying Rehearing in banc With Dissenting Opinion

Walter H. Fleischer, Attorney, Department of Justice, William D. Ruckelshaus, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, Wade H. Ballard, United States Attorney, L. Alvin Hunt, Stanley E. Preiser and Preiser, Greene, Hunt & Wilson on brief) for Appellees.

Order Denying Motion for Reconsideration

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

ORDER DENYING MOTION FOR RECONSIDERATION

Upon consideration of the motion filed by the plaintiffs-appellants, Triangle Improvement Council, et al., for reconsideration of the opinion of this court announced on May 14, 1970, affirming the decision of the District Court, it is

ORDERED that the said motion be, and it is hereby, denied.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ J. BRAXTON CRAVEN
United States Circuit Judge

/s/ WOODROW W. JONES
United States Circuit [*sic*] *Judge*

FILED
JUL 14 1970

SAMUEL W. PHILLIPS
Clerk

Judge Sobeloff would grant the petition for rehearing, along with Judge Winter.

SOBELOFF, Circuit Judge, dissenting from the denial of a rehearing en banc: WINTER, Circuit Judge, joins in this opinion.

In light of the cryptic treatment given this appeal by the panel which decided it, I feel constrained briefly to set forth the issue, the panel's rationale, and the reasons for my disagreement.

The appellants are residents of Charleston, West Virginia's black ghetto, known as the Triangle, who will shortly be uprooted from their homes to make way for the construction of an interstate highway. They have now abandoned their futile efforts to halt or divert the road. Their sole objective at this point is to assure that when displaced they will be able to obtain adequate replacement housing, as guaranteed by federal law.

The plaintiffs' concern arises from a critical housing situation in Charleston. According to one study they cite, standard housing is only sparsely available for poor people generally, and hardly at all for poor blacks.[1] The problem of an ever shrinking housing supply has been grossly aggravated by a series of public projects, including highway construction, which have extensively eliminated housing facilities and continue to do so.

Despite informal promises made to them by state and federal officials that adequate housing will be available, the appellants are seriously apprehensive that when the time comes for them to move there will be nowhere to go

[1] Additionally, three memoranda of the federal right-of-way officer support this contention.

except to substandard, inferior quarters. It is for this reason that they demand that the state authorities comply fully with the federal requirement to submit a detailed, comprehensive relocation plan. Such a study, they say, will demonstrate that contrary to the representations of defendants, there are gross deficiencies in the housing potentially available to displacees. If the survey does support their claims there will be time before displacement to take steps, in conformity with federal law, to alleviate the problem.

The defendants assert that adequate replacement housing will exist, yet they reject the necessity for an analysis that would definitely test, either to contradict or corroborate, their assertion.[2] The sole issue on this appeal is whether

---

[2] In response to this litigation the state authorities prepared a purported "relocation plan." This has not been reviewed by federal officials and there is no contention that it meets the federal standards for a sufficient plan. According to the appellants much of the proposed replacement housing referred to in the plan is either far above the financial eligibility of the displacees, not available to black people, or already occupied. Furthermore, the plan, it is said, gives no consideration to the competing demands of displacees from outside the Triangle area. Whether or not appellants' allegations are true, it is clear that any lacunae that exist in this "plan" would be filled by the federally mandated one. See note 3, *infra*.

Instead of furnishing a comprehensive plan, the defendants now rely on the District Judge's finding that "adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor." The plaintiffs dispute the finding and, moreover, point out that it is not up to us, nor was it for the District Court, to weigh the validity of the state's relocation program. Under the 1968 amendments, which the plaintiffs insist are applicable, there is a precise, effective administrative procedure for evaluation of the adequacy of proposed replacement housing.

If the 1968 amendments are indeed applicable, this case would seem, in light of the defendants' conduct during this lawsuit, note 6, infra, to be a particularly appropriate one in which to insist upon strict compliance with the letter of the law.

federal law requires submission of a detailed relocation plan as insisted by appellants.

In 1968 Congress recognized the predicament of poor persons whose homes are destroyed to make way for a highway, with no provision of alternative accommodations. Thus the Congress passed extensive amendments to the Federal-Aid Highway Act to provide for the "prompt and equitable relocation and reestablishment of persons" displaced by federal highway programs. 23 U.S.C. § 501. Theretofore no duty was owed to displaced persons save to furnish them information. 23 U.S.C. § 133. The cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal. Under the new provisions, enacted to alleviate the inequity the Secretary may not approve a highway project unless he receives "satisfactory assurances" that, inter alia, prior to displacement, there will be available in adequate number and within the financial means of displaced persons "decent, safe and sanitary dwellings." 23 U.S.C. § 502.

What constitutes "satisfactory assurances" has been defined by regulation. They may not be merely vague or general promises. Instead, the statute and the regulations adopted pursuant thereto make mandatory a plan of relocation which describes the methods and procedures to be used and specifies detailed data concerning the replacement housing to be provided. There must also be a report probing relocation problems, analyzing other public programs affecting the availability of housing, furnishing information on concurrent displacement caused by other agencies, estimating the time required to accomplish the plan, and demonstrating that the plan is adequate "to carry out a timely, orderly and humane relocation program." IM-80-1-

68-(7) (b).[2] It is this accumulation of proposal and fact that enables federal officials to review the plan to determine whether

> [t]he State's relocation plan is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing with minimum hardship on those affected. IM-80-1-68-(5) (a).

Approval by the Secretary is necessary at two junctures of a project; first before right-of-way acquisition and then again before actual construction. 23 U.S.C. § 106; *Policy and Procedure Memorandum* 21-5. Rights-of-way for the projects involved in this case were authorized in 1966 and 1967. However, there has yet to be final approval of the construction phase. Thus it would seem that the above described requirement of a thorough plan must be fulfilled before construction in the Triange may proceed.

---

[3] IM-80-1-68-(7)(b) provides:

> The State highway department, prior to proceeding with right-of-way negotiations and/or construction shall furnish the following information for review and approval by the division engineer:
>
> (1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing at reasonable rents or prices and readily accessible to his place of employment.
>
> (2) The method and procedure by which the State will assure an inventory of currently available comparable housing which is decent, safe, and sanitary, including type of building, state of repair, number of rooms, needs of the person or family being displaced (based on standards outlined in paragraph 13i), type of neighborhood, proximity of public transportation and commercial shopping areas, and distance to any pertinent social institutions, such as church, community facilities, etc. The use of maps, plats, charts, etc., would be useful at this stage.

The defendants, however, argued that the 1968 amendments do not apply to any project in which any approval of the Secretary (either for acquisition or for construction) was obtained prior to 1968. Thus, since acquisition authorizations were obtained in 1966 and 1967, the argument ran, the new relocation provisions are inapplicable here. Defendants based their interpretation on a Department of Transportation regulation providing that

> assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. [September 1968]. IM-80-1-68-(5) (b).

The plaintiffs objected that this reading of the statute, resulting in the disregard of the 1968 relocation amendments in respect to 1970 displacements, is inconsistent with the plain statutory language, the legislative history, as well as other Department of Transportation regulations.

The District Judge accepted the defendants' view. In doing so he relied on *Udall* v. *Tallman*, 380 U.S. 1 (1965), which held that courts should show "great deference to the interpretation given the statute by the officers or agency charged with its administration" and should sustain those interpretations unless unreasonable. Accordingly, he found that "the agency's determination had a rational basis and should not be disturbed." This holding a panel of this court embraced in its one-sentence affirmance "on the opinion of the District Court."

However, subsequent to the opinion of the District Court the federal authorities issued new guidelines. These declarations, a policy directive of the Secretary of Transpor-

tation[4] and an implementing memorandum of the Federal Highway Administration,[5] reveal that federal regulations no longer subscribe to the view of limited applicability of the 1968 amendments. Rather, the new policy makes clear that, as interpreted by the Department of Transportation, the amendments pertain to all approvals of construction, even when projects have been previously authorized. Accordingy, since an appellate court "must apply the law in effect at the time it renders its decision," *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969),[6] then precisely for the reasons the District Court (and then the panel) accepted the now-discarded interpretation, this court is obliged to adopt the more, recent view.

It remains to inquire why this court has not acted on these developments. The initial panel opinion, adopting the reasoning of the District Court, logically cannot serve to answer this question because the new administrative regulations came after the opinion below. The opinionless order denying a rehearing provides no further elucidation. It is therefore necessary to set out the panel's view as I infer it to be. There is, of course, no dispute within the court that the appellants' position on the applicability of the 1968 amendments has now become the law and that comprehensive relocation plans are required before construction can be approved. Rather, my brethren seem to think that the new regulation, expressly recognizing the

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[4] Memorandum of Secretary of Department of Transportation: Implementation of Replacement Housing Policy, January 15, 1970.

[5] Federal Highway Administration Circular Memorandum: Relocation Assistance—Availability of Replacement Housing, March 27, 1970.

[6] It was on this theory that a separate panel of this court, consisting of Judges Haynesworth, Boreman and Sobeloff, ordered the federal defendants, who had resisted, to produce the Memorandum of the Secretary.

plaintiffs' rights under the 1968 amendments, has somehow eliminated the need for relief. Their position apparently is that there is no reason to suppose that the new policy will not be applied to the Triangle and, accordingly, appellants' claim is thus mooted, at least for the time being.

I cannot subscribe to this expectation. The question is anything but moot. The defendants have consistently taken the position, both before and during the litigation, that the state authorities need not submit and the federal officials need not review a formal relocation plan. They have continued to press this contention on appeal in spite of the policy change of which they were aware. Moreover, they have been less than forthright in the course of this litigation. They resisted, without justification, producing the very memorandum of the Secretary that announced the new position and did not supply it until ordered to do so by the court. Under these circumstances I cannot think that court-ordered relief would be superfluous. On the contrary, the defendants' refusal to accord the plaintiffs' their rights cries out for redress.

Nor do I perceive any justification for the cavalier treatment accorded the appeal and the petition for rehearing. Even if injunctive relief is not appropriate this court should not, by its silence, permit any possible implication that the obligations on the defendants have not been altered since the District Court's order. As I understand it, the affirmance is based on confidence that the defendants will perform their duty, not that they have none to fulfill. When the court acknowledges the duty but without explanation does nothing to enforce it, the decision will be read by some as a holding that there is no duty. At the very least the court should have explicated its rationale to underscore the obligation and prevent misreading. Its failure to do so constitutes serious error.

APPENDIX B

Statutes & Regulations

1968 HIGHWAY RELOCATION AMENDMENTS (23 U.S.C. §501 *et seq.*)

§ 501. Declaration of policy

Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so displaced in accordance with the provisions of this title.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 830.

§ 502. Assurances of adequate relocation assistance program

The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any persons, business, or farm operation unless he receives satisfactory assurances from the State highway department that—

(1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title;

(2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and

(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 831.

§ 504. Federal reimbursement

. . .

(b) Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 831.

§ 508. Relocation services

(a) Each State shall provide a relocation advisory assistance program which shall include such measures, facilities, or services as may be necessary or appropriate in order—

(1) to determine the needs, if any, of displaced families, individuals, business concerns, and farm operators for relocation assistance;

(2) to assure that, within a reasonable period of time, prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, housing meeting the standards established by the Secretary for decent, safe, and sanitary dwellings, equal in number to the number of, and available to, such displaced families and individuals and reasonably accessible to their places of employment;

(3) to assist owners of displaced businesses and displaced farm operators in obtaining and becoming established in suitable locations; and

(4) to supply information concerning the Federal Housing Administration home acquisition program under section 221(d) (2) of the National Housing Act, the small business disaster loan program under section 7(b) (3) of the Small Business Act, and other State or Federal programs offering assistance to displaced persons.

(b) Nothing in this chapter shall be construed to prohibit any person from exercising any right or remedy available to him under State law with respect to any action of a State agency in carrying out this chapter.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 833.

§ 510. Authority of the Secretary

(a) To carry into effect the provisions of this chapter, the Secretary is authorized to make such rules and regulations as he may determine to be necessary to assure—

(1) that the payments authorized by this chapter shall be fair and reasonable and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this chapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the State agency making such determination.

(b) The Secretary may make such other rules and regulations consistent with the provisions of this chapter as he deems necessary or appropriate to carry out this chapter.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 834.

§ 511. Definitions

As used in this chapter—

. . .

(3) The term "displaced person" means any person who moves from real property on or after the effective date of this chapter as a result of the acquisition or reasonable expectation of acquisition of such real property, which is subsequently acquired, in whole or in part, for a Federal-aid highway, or as the result of the acquisition for a Federal-aid highway of other real property on which such person conducts a business or farm operation.

Statutes

Fair Housing Act of 1968
(42 U.S.C. §3601 et seq.)

§3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Publ. L. 90-284, Title VIII, §801, Apr. 11, 1968, 82 Stat. 81.

§3608. Administration-Authority and responsibility

(a) . . . . . .

(b) . . . . . .

Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

Regulations

U.S. DEPARTMENT OF TRANSPORTATION.
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

September 5, 1968

INSTRUCTIONAL MEMORANDUM 80-1-68
34-10

SUBJECT: Relocation Assistance and Payments—Interim Operating Procedures (RCS 34-01-03)
(B/B 04-R-2211)

There are enclosed Interim Operating Procedures covering the administration of the Highway Relocation Assistance Program established by Chapter 5 of Title 23, U.S.C.

These procedures supersede paragraph 3 of PPM 80-5 and will be incorporated in a new Policy and Procedure Memorandum after a period of operation thereunder.

/s/ F. C. TURNER
F. C. Turner
Director of Public Roads

/s/ LOWELL K. BRIDWELL
Lowell K. Bridwell
Federal Highway Administrator

[Including Amendments of Paragraphs 5a(2), 5a(5) and 7b(2) dated November 15, 1968]

Regulations

Interim Operating Procedures
Relocation Assistance and Payments

1. PURPOSE

In accordance with Chapter 5 of Title 23, U.S.C., this memorandum prescribes policies and procedures relating to the following:

a. Administration of the relocation program and the provision of relocation payments and services to individuals, families, businesses, and farm operators displaced by Federal-aid highway construction;

b. Eligibility for reimbursement of relocation payments and costs of services by State and State designated agencies; and

c. Relocation payment records and relocation advisory assistance reports.

2. EFFECTIVE DATE AND APPLICABILITY

a. The provisions of this memorandum are effective August 23, 1968, and the payments and services described herein shall be provided by the State to the extent that such State is able to comply herewith under its laws. After July 1, 1970, such payments and services shall be provided by all States.

b. The provisions of this memorandum are applicable to the following:

(1) All Federal-aid highway projects authorized after August 23, 1968, involving rights-of-way which are occupied by an individual, family, business, farm operator, or nonprofit organization.

Regulations

(2) All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

(3) Rights-of-way acquired without Federal participation upon which the State intends to construct a Federal-aid project from which as of August 23, 1968, individuals, families, business, farm operations, and nonprofit organizations have not been displaced.

3. AUTHORITY

Statutory authority for this memorandum is set forth in Chapter 5 of Title 23, U.S.C. (23 U.S.C. 501 *et seq.*)

4. PROGRAMMING

. . .

b. Any project agreement with a State which was executed on or before August 23, 1968, and which requires the use of property not acquired as of that date shall be amended to include the cost of providing the payments and services described in this memorandum. Any number of projects may be amended in a single action with each project identified. Form PR-37, Project Status Record, must be prepared for each project as required by Volume 22, Chapter V, Administrative Manual. Attach a copy of the modified agreement to each PR-37.

5. ASSURANCES OF ADEQUATE RELOCATION ASSISTANCE PROGRAM

a. No State highway department shall be authorized to proceed with any phase of any project which will cause

the displacement of any person or any construction project concerning any right-of-way acquired by the State without Federal participation and coming within the provisions of paragraph 2b(3) above, until it has furnished satisfactory assurances to the extent State law permits, that:

(1) Relocation payments and services were or will be provided as set forth in paragraphs 6-10 of this memorandum.

(2) In the event housing available to persons without regard to race, color, religion or national origin will not be available within a reasonable period of time prior to displacement as provided in paragraph 7 of this memorandum, the State shall provide a detailed statement specifying the respects in which such assurance cannot be furnished, the extent to which such housing will be available prior to displacement, the period of time prior to displacement when that housing will become available and an estimate of the additional time within which such housing will become available to the extent that it can be reasonably accomplished.

(3) The public was or will be adequately informed of the relocation payments and services which will be available, as set forth in paragraph 12 of this memorandum.

(4) No person lawfully occupying the real property shall be required to move from his home, farm or business location without at least 90 days written notice of the intended vacation date from the State or political subdivision having responsibility for such acquisition. This provision must be carried out to the maximum extent practicable and exceptions should be made only in the case of very unusual conditions. Such assurance can be furnished on a State-

wide basis or set forth in Point 31 of the State's statement of organization and procedures.

(5) The State's relocation program is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing available to persons without regard to race, color, religion or national origin with minimum hardship on those affected.

b. The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum.

c. The State's assurances shall be accompanied by a statement in which it specifies the provisions of this memorandum with which it is unable under its laws to comply in whole or in part. In the event a State maintains that it is legally unable to comply fully with one or more of the provisions of this memorandum, its statement shall be supported by an opinion of the chief legal officer of the highway department in which he discusses the legal issues raised and cites reasons and authorities in support of his conclusion for each representation of legal inability to comply.

7. Development of Relocation Program Plan.

The planning for the relocation program shall be accomplished in stages:

a. Conceptual Stage. A project will be considered to be in this stage until such time as the final location is ap-

proved. At this stage the tenant is not to be disturbed in any way. The cost incurred in connection with securing this information is chargeable to preliminary engineering. Prior to the completion of this stage and prior to the public hearing, the State shall make preliminary investigations which will furnish the following information for each of the various alternative locations given final consideration.

(1) Approximate number of individuals, families, businesses, farms, and nonprofit organizations that would be displaced.

(2) The probable availability of decent, safe, and sanitary replacement housing within the financial means of those displaced.

(3) The basis upon which the above findings were made and a statement relative thereto by the State to the Bureau of Public Roads.

b. Right-of-Way Acquisition and/or Construction Stage.

The State highway department, prior to proceeding with right-of-way negotiations and/or construction shall furnish the following information for review and approval by the division engineer:

(1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing at reasonable rents or prices and readily accessible to his place of employment.

(2) The method and procedure by which the State will assure an inventory of currently available comparable housing available to persons without regard to race, color, religion or national origin which is decent, safe, and sani-

tary, including type of building, state of repair, number of rooms, needs of the person or family being displaced (based on standards outlined in paragraph 13a), type of neighborhood, proximity of public transportation and commercial shopping areas, and distance to any pertinent social institutions, such as church, community facilities, etc. The use of maps, plats, charts, etc., would be useful at this stage.

(3) An analysis relating to the characteristics of the inventories so as to develop a relocation plan which will:

(a) outline the various relocation problems disclosed by the above survey;

(b) provide an analysis of Federal, State and community programs affecting the availability of housing currently in operation in the project area;

(c) provide detailed information on concurrent displacement and relocation by other governmental agencies or private concerns;

(d) provide an analysis of the problems involved and the method of operation to resolve and relocate the relocatees.

(e) estimate the amount of leadtime required and demonstrate its adequacy to carry out a timely, orderly and humane relocation program;

(f) assure no person lawfully occupying real property shall be required to move without at least 90 days written notice; and

(g) furnish the names of the agency or agencies, if other than the State, which will provide the relocation assistance including an analysis of their present workload

and ability to perform and the estimated number and job titles of relocation personnel servicing the project.

13. STANDARDS FOR DECENT, SAFE, AND SANITARY HOUSING

a. A decent, safe, and sanitary dwelling is one which meets all of the following minimum requirements:

(1) Conforms with all applicable provisions for existing structures that have been established under State or local building, plumbing, electrical, housing and occupancy codes and similar ordinances or regulations applicable to the property in question.

(2) Has a continuing and adequate supply of potable safe water.

(3) Has a kitchen or an area set aside for kitchen use which contains a sink in good working condition and connected to hot and cold water, and a sewage disposal system. A stove and refigerator in good operating condition shall be provided when required by local codes, ordinances or custom. When these facilities are not so required by local codes, ordinances, or custom the kitchen area or area set aside for such use shall have utility service connections and adequate space for the installation of such facilities.

(4) Has an adequate heating system in good working order which will maintain a minimum temperature of 70 degrees in the living area under local outdoor design temperature conditions. A heating system will not be required in those geographical areas where such is not normally included in new housing.

(5) Has a bathroom, well lighted and ventilated and affording privacy to a person within it, containing a lava-

tory basin and a bathtub or stall shower, properly connected to an adequate supply of hot and cold running water, and a flush water closet, all in good working order and properly connected to a sewage disposal system.

(6) Has provision for artificial lighting for each room.

(7) Is structrally sound, in good repair and adequately maintained.

(8) Each building used for dwelling purposes shall have two safe unobstructed means of egress leading to safe open space at ground level. Each dwelling unit in a multi-dwelling building must have access either directly or through a common corridor to two means of egress to open space at ground level. In buildings of three stories or more, the common corridor on each story must have at least two means of egress.

(9) Has 150 square feet of habitable floor space for the first occupant in a standard living unit and at least 100 square feet of habitable floor space for each additional occupant. The floor space is to be subdivided into sufficient rooms to be adequate for the family. All rooms must be adequately ventilated. Habitable floor space is defined as that space used for sleeping, living, cooking or dining purposes, and excludes such enclosed places as closets, pantries, bath or toilet rooms, service rooms, connecting corridors, laundries, and unfinished attics, foyers, storage spaces, cellars, utility rooms and similar spaces.

b. Rental of sleeping rooms. The standards for decent, safe, and sanitary housing as applied to the rental of sleeping rooms shall include the minimum requirements contained in subparagraphs a(1), (4), (6), (7) and (8) of this paragraph and the following:

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(1) At least 100 square feet of habitable floor space for the first occupant and 50 square feet of habitable floor space for each additional occupant.

(2) Lavatory and toilet facilities that provide privacy including a door that can be locked if such facilities are separate from the room.

c. In lieu of the standards listed in this paragraph the agency providing the relocation assistance described in the PPM may submit for approval by the Director of Public Roads a local housing code by means of which the decent, safe, and sanitary nature of replacement housing for a project is to be judged. Any code so submitted shall be reasonably comparable to the list of standards incorporated in this paragraph.

d. The Director of Public Roads may approve exceptions to the standards in this paragraph where unusual conditions exist.

Regulations

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D. C. 20591

February 12, 1969

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM: J. A. Swanson, Director of Right-of-Way and 34-10 Location Washington, D. C. s/ John A. Swanson

SUBJECT: Relocation Procedures—Going Projects

Paragraphs 2 (b) (2) and (3) of IM 80-1-68 state that its provisions are applicable to all active Federal-aid projects and to all other active projects upon which the State later intends to construct a Federal-aid project where there remain individuals families, businesses, farm operations, and non-profit organizations which will be displaced.

In accomplishing the planning for the relocation program required under paragraph 7, the State should undertake such planning on all active projects to the extent that it is reasonable and proper. Each such project undoubtedly will involve a different set of circumstances and conditions. It, therefore, will be necessary for the division engineer to carefully review the status of each project before issuing any additional authorizations to acequire right-of-way or to authorize construction on a project for which right of way was acquired after August 23, 1968, irrespective of the source of funds utilized for such acquisition, to assure himself that the State has or will make the necessary re-

locations without undue hardship to the relocatees. If a major portion of the relocations have previously been accomplished very little good would result from going through the conceptual stage study. However, if a substantial number of persons remain to be relocated at any time an authorization is requested which would require such relocation, it would seem that the division engineer would need to have the information required by paragraph 7b. Some variation may be permitted by the division engineer when the circumstances warrant.

It should always be borne in mind that regardless of the information furnished at this stage of the project it is the responsibility of the State to furnish relocation assistance, and payments where authorized by State law, in accordance with the requirements of the law and the Im. At no time should a relocatee be forced into housing less desirable than that from which he was required to move and to the extent possible under State law all relocations should be made to decent, safe and sanitary dwellings.

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MEMORANDUM

DEPARTMENT OF TRANSPORTATION
Office of the Secretary

Date: January 15, 1970

SUBJECT: Implementation of Replacement Housing Policy

FROM : The Secretary

TO : Commandant, United States Coast Guard
Federal Aviation Administrator
Federal Highway Administrator
Federal Railroad Administrator
Urban Mass Transportation Administrator

I have reviewed the procedures for implementation of the DOT replacement housing policy as submitted in response to my October 20, 1969, memorandum.

I find that some of the submissions should be improved to clearly emphasize and cover certain aspects of this new policy. Ordinarily I would request that the necessary changes be made and the procedures resubmitted to me for final approval. However, I consider this new policy so important that I am approving the procedures at this time so that you can make the necessary changes and place them into effect without delay. For your assistance in this regard, attached are copies of all of the proposed procedures submitted. The procedures for the Federal Railroad Administration are still being developed and will be provided other addressees by the Federal Railroad Administrator directly.

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Each of you should reexamine your proposed procedures and make any modifications or changes necessary to make certain that they emphasize and provide full and specific coverage of the following points:

1. Specific written assurances that adequate replacement housing will be available or provided for (built, if necessary) will be required before the *initial* approval or endorsement of any project.

2. Construction will be authorized only upon verification that replacement housing is in place and has been made available to all affected persons.

3. All replacement housing must be fair housing—open to all persons regardless of race, color, religion, sex or national origin. This is in addition to the requirement that replacement housing must be offered all affected persons regardless of their race, color, religion, sex or national origin. Coverage of these two points is consistent with the requirements of Title VIII of the Civil Rights Act of 1968 and Title VI of the Civil Rights Act of 1964,

Copies of your final procedures to implement this policy should be submitted to the Departmental Director of Civil Rights as soon as possible.

/s/ JOHN VOLPE

Attachments

Regulations

[EMBLEM]

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

April 10, 1970

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM : John A. Swanson, Associate Director
34–10 for Right-of-Way and Location
Washington, D.C.

SUBJECT: Relocation Assistance—Availability of Replacement Housing (Supersedes White Circular Memorandum dated March 27, 1970)

This memorandum is applicable to the following:

a. All Federal-aid or any other highway projects financed in whole or in part with Federal-aid highway funds or other Federal funds authorized on or after May 1, 1970, involving rights-of-way which are occupied by an individual or family.

b. All Federal-aid or any other highway project financed in whole or in part with Federal-aid highway funds or other Federal funds authorized prior to May 1, 1970, on which individuals or families are still to be displaced as of May 1, 1970.

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The division engineer shall not authorize any phase of construction (clearance of right-of-way regardless of how performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, or permit the dislocation of individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy.

Such replacement housing shall be:

a. Fair housing—open to all persons regardless of race, color, religion, sex, or national origin.

b. In areas not generally less desirable in regard to:

   1. Public utilities

   2. Public and commercial facilities

c. Available at rents or prices within the financial means of the families and individuals displaced.

d. Decent, safe and sanitary.

e. Reasonably accessible to the displacees' places of employment.

f. Adequate to accommodate the displacee.

The applicable PPM's and IM's are being revised to conform to the above policy.